UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

GUARDSMARK, LLC[1]

Employer

and **Case 7-RC-23019**

PLANT PROTECTION ASSOCIATION NATIONAL

Petitioner

APPEARANCES:

William P. Dougherty, Attorney, of Memphis, Tennessee, for the Employer
Larry D. Daniel, President, of Ypsilanti, Michigan, for the Petitioner, and Frank A. Guido, Attorney, of Redford, Michigan, on brief

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.[3]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

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[1] The name of the Employer appears as amended at hearing.
[2] Both parties filed briefs, which were carefully considered.
[3] See discussion below.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Issues

The Employer is a nationwide provider of security services. The parties stipulated that the appropriate bargaining unit is all full-time and regular part-time protective services officers employed by the Employer at Ford Motor Company's parts distribution center located at 11871 Middlebelt Road, Livonia, Michigan, but excluding office clerical employees, supervisors as defined in the Act, and all nonguard employees. The unit consists of approximately 12 employees. No one contends, and there is no evidence that, the stipulated unit includes employees other than guards.

The primary issue is whether Section 9(b)(3) of the Act prohibits Petitioner from being certified as the representative of the unit it seeks to represent. The Employer contends that Petitioner may not be certified because in a different bargaining unit consisting of other employees employed by the Employer, Petitioner admits nonguards into membership. Petitioner responds that the Employer's contention is identical to the issue raised by the Employer in Case 7-RC-22970, an earlier case involving the same parties. Petitioner asserts that the Employer's claim is barred by the doctrines of res judicata and collateral estoppel. For the first time in its brief, the Employer also argues that no decision should be issued in this matter until the merits of ***Ford Motor Co.***, Case 7-CA-48345, are determined. In that case, a complaint has issued that alleges Ford failed and refused to bargain with Petitioner over both its decision to subcontract plant protection work to the Employer and the effects of that decision on a bargaining unit represented by Petitioner.

I find that the issue raised by the Employer regarding the certifiability of Petitioner has been fully argued and litigated in Case 7-RC-22970 and may not be relitigated in this case. I further find that processing of this case will not be held in abeyance pending disposition of Case 7-CA-48345.

The prior case

In Case 7-RC-22970, filed on March 21, 2006,[4] Petitioner sought to represent a unit of security officers employed by the Employer at various Dearborn, Michigan sites of Ford Land Commercial Properties. The Employer

[4] All dates hereinafter are in 2006, unless otherwise noted.

raised the same issue as it has here: employees in the fire officers level II (FO-II) classification within the protective services officers bargaining unit contained in a 2005-2008 collective bargaining agreement between the Employer and Petitioner at various Ford Motor Company installations throughout the United States are nonguards, and at least three of those nonguards are admitted into membership with Petitioner. In a decision issued on May 1, I found that the FO-IIs were guards and directed an election in the petitioned-for unit. In addition, I noted that, even if the FO-IIs were not guards, it was unclear whether the Employer could be heard to question their guard status, citing ***Rapid Armored Corp.***, 323 NLRB 709 (1997). In that case, the Board concluded that it would not permit collateral attacks on the guard status of "close call" employees who worked for a stranger employer to establish the noncertifiability of a union under Section 9(b)(3) of the Act. The argument for not permitting collateral attack in Case 7-RC-22970 was even stronger. The Employer was not contesting the guard status of employees of a stranger employer; it was contesting the guard status of certain of its own employees soon after negotiating a contract that included those employees in a guard unit.

The Employer filed with the Board a Request for Review of my Decision and Direction of Election. On May 25, the Board issued its Order in which it denied the Request for Review, stating that it raised no substantial issues warranting review. The Board found it unnecessary to pass on the guard status of the FO-IIs. Rather, the Board found that the Employer may not question in that proceeding the guard status of the FO-IIs where the Employer had recently voluntarily entered into a contract with Petitioner that included FO-II employees. The Board, citing ***Rapid Armored***, supra, noted that the Employer may file at an appropriate time a unit clarification petition seeking to exclude the FO-II employees from the contractual unit.

An election was held on May 26 and Petitioner received a majority of the valid votes counted. The Employer timely filed objections to the election. In its objections, the Employer contended that I and the Board had erroneously precluded the Employer from litigating in the pre-election hearing the issue of whether Petitioner was disqualified from representing the petitioned-for unit because it admitted nonguards. It argued that documentary evidence and testimony regarding that evidence was arbitrarily and without valid reason rejected and excluded from the record. It also argued that the Board's finding that the Employer was precluded from litigating the non-certifiability of Petitioner because it had recently entered into a contract with Petitioner that included the FO-IIs was unsupported by the record and Board precedent. On June 20, I issued a Supplemental Decision on Objections to Election and Certification of Representative in which I overruled the Employer's objections. The Employer

filed with the Board a Request for Review of my Decision and Certification. On July 28, the Board issued an order denying the Employer's Request for Review finding that it raised no substantial issues warranting review.

The Employer's arguments

The Employer first argues that the hearing officer erroneously rejected all of its evidence. The hearing officer did preclude the Employer from presenting evidence on the issue of the nonguard status of the FO-IIs. However, her decision to do so was not erroneous. In Case 7-RC-22970, the guard status of the FO-IIs was argued and litigated. As noted above, I concluded they were guards[5] and stated, in the alternative, that it was questionable whether the Employer could contest their guard status. The Board did not rule on the guard status of the FO-IIs. Instead, it found that the Employer may not question their guard status because of their voluntary inclusion of those employees in a contract with Petitioner. Thus, the Board has already held that it does not matter whether the FO-IIs are, in fact, guards.

The issue surrounding the guard status of the FO-II employees and the certifiability of the Petitioner has been fully argued and litigated in Case 7-RC-22970, a case involving the same parties. Additional litigation of the issue in this case is not warranted. ***Carry Companies of Illinois, Inc.***, 310 NLRB 860 (1993); ***Graneto Datsun***, 220 NLRB 399 fn. 1 (1975)

The Employer asserts that the Board's Order in Case 7-RC-22970 specifically states that its finding in that case was limited to "the present proceeding." The Board did not state that its finding was so limited. Rather, the Board wrote, "…Thus, we find that the Employer may not question, in the present proceeding, the guard status of its FO-II employees located in Ohio…" The Board likely used that phrasing because at the end of its Order, it referred to another potential proceeding where the Employer could question the guard status of its FO-II employees: the Board stated the Employer may file at an appropriate time a unit clarification petition seeking to exclude the FO-II employees from the unit. In any event, even if the Board's finding was limited to that case, the finding still applies here. The petition in this case was filed less than four months after the petition in Case 7-RC-22970. The 2005-2008 contract between the Employer and Petitioner is still very much in effect. There are no changed circumstances. Thus, the Board's finding in Case 7-RC-22970 is applicable to this case. The Employer may not question the guard status of the FO-II employees. ***Id.***

[5] In its brief, the Employer asserts that the hearing officer erroneously stated that I had ruled in Case 7-RC-22970 that the FO-II employees "were in fact guards." The hearing officer's statement was not erroneous. I did find in Case 7-RC-22970 that the FO-II employees were guards.

The Employer next argues that, had it been allowed to present its evidence, it would have shown that the FO-II employees were not guards, the Petitioner admits nonguards to membership, and, as a result, the Petitioner may not be certified by the Board and the petition should be dismissed. The Employer already presented evidence in Case 7-RC-22970 on the guard status of the FO-II employees and I found that they were guards. More importantly, as the Board has already found, it does not matter whether they are guards. The Employer may not collaterally attack their guard status. Once again, the Board's finding in that case is applicable here. ***Id.***

The Employer's final argument is that the decision in this matter should be delayed until the merits of Case 7-CA-48345 involving Ford Motor Company and Petitioner have been determined. This matter should not be held in abeyance.

In May 2005, Ford subcontracted to the Employer certain plant protection work performed by its employees. Some of those employees were represented by Petitioner. In Case 7-CA-48345, a complaint has issued that alleges Ford failed and refused to bargain with Petitioner about that decision and the effects of that decision on the unit represented by Petitioner. Trial in the case currently is scheduled to begin in November.

The Employer asserts in its brief that if the Region prevails in the case and Ford is ultimately required to resume plant protection work, this action could have an impact on the unit sought by Petitioner in this case. First and foremost, the unit sought in this case is not part of the bargaining unit involved in Case 7-CA-48345. Thus, any decision and remedy in that case will not directly impact the petitioned-for unit. The remedy does not seek Ford to resume the plant protection work performed at the facility involved in this proceeding. Any indirect impact on the unit is too remote and speculative to warrant any consideration. Delaying the employees' right to vote on representation is not appropriate. They are employees of the Employer. As such, they have the right to determine now whether they wish to be represented by Petitioner. That right should not be delayed based on the possibility that at some time in the future the employees may return to the employ of another employer. Further, if its argument was sustained, the Employer, by an act of the Board, would be allowed to remain union-free for perhaps several years without any right by its employees to vote on union representation. Such an outcome would be counter to the purposes of the Act.[6]

[6] The same response to the Employer's argument would apply even if the petitioned-for unit was part of the unit involved in the unfair labor practice case.

5. In view of the foregoing, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time protective services officers employed by the Employer at Ford Motor Company's parts distribution center located at 11871 Middlebelt Road, Livonia, Michigan; but excluding office clerical employees, supervisors as defined in the Act, and all nonguard employees.[7]

Those eligible shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 8th day of August 2006.

"/s/[Stephen M. Glasser]."

(SEAL) /s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director
National Labor Relations Board – Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226

[7] Although the parties did not so stipulate, it is uncontested that the stipulated bargaining unit consists solely of statutory guards.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of this office among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who quit or are discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike, who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

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LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969); ***North Macon Health Care Facility***, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision, **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile or E-mail transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **August 15, 2006.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570.** This request must be received by the Board in Washington by **August 22, 2006.**

POSTING OF ELECTION NOTICES

a. Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. */

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

*/ Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.